Virginia Law Register

VOL. VII.] JUNE, 1901. [No. 2.

POWERS OF CONVENTIONS.

"No free government or the blessings of liberty can be preserved to any people but by . . . a frequent recurrence to fundamental principles." *Virginia Bill of Rights, sec. 17.*

In view of the assertion, by many of the most respectable and influential of our newspapers and public men, of the mistaken and dangerous doctrine of the absolute sovereignty and omnipotence of Constitutional Conventions,[1] it is believed that the time has come for that "recurrence to fundamental principles" declared by the founders of the Commonwealth to be so necessary for the preservation of "free government and the blessings of liberty"; and, particularly, is it appropriate and essential that the members of the Constitutional Convention about to be held in this State should clearly view and comprehend the source and extent of their authority, and that, in all they do, they should look constantly "to the rock from whence they were hewn."

Constitutional Conventions are *properly* so called not so much because they frame constitutions as because they are *constitutional bodies*, based upon existing constitutional provisions, as distinct from *Revolutionary* Conventions, created in violation, or in the absence, of existing constitutional provisions.[2]

These two institutions are frequently confused, and often the extraordinary, practically unlimited, powers of a Revolutionary Convention are erroneously attributed to a Constitutional Convention. It is the purpose of this article to point out the differences between the natures,

[1] A doctrine which has apparently received the authoritative *imprimatur* of the late distinguished John Randolph Tucker. We say "apparently" because we cannot but think that the few words which that learned writer bestowed on the subject should be regarded as *obiter dicta*. See Tucker's U. S. Const., sec. 56. Yet, as Prof. Oberholtzer says, the last Constitutional Conventions in Mississippi, South Carolina, Delaware, Louisiana and Kentucky "came dangerously near" adopting and acting upon this pernicious theory. Referendum in America, Ch. IV.

[2] Jameson's Const. Con., sec. 11; opinion of O'Neil, J., in State *ex rel.* McDaniel *v.* McMeekin, 2 Hill (S. C.) 273; Judge Jeremiah T. Black in Debates Penn. Con. (1872), Vol. I., pp. 57-58; Judge Sharswood in Wells *v.* Bain, 75 Pa. St. Rep. 48.

powers and functions of these two bodies, and to trace the limits of the powers of the latter.

The Constitutional Convention is normal, the Revolutionary Convention is abnormal; the one is the child of law and order, the other, of violence and anarchy; the former is the companion of Peace, the latter the concomitant of War; the one is the fruit of political health, the other of political disease; the one evidences the growth and development of government, the other its overthrow; the former is the legitimate offspring of existing government, the latter a dispossessing intruder. The Constitutional Convention co-exists with the former government, which continues to perform its functions, by virtue of the old Constitution and laws, until the new Constitution is adopted; the *Revolutionary* Convention is the Government itself, the co-existence with which of any other government is impossible. The Constitutional Convention repairs and improves the Government, the Revolutionary Convention rebuilds it *de novo* after it has been pulled down and destroyed. One body exists as a lawful institution, the other exists because there is no law; the one necessarily recognizes the governmental system which gave it birth and by which it is bound, the other recognizes no institution and is a law unto itself. One is legitimate, the other illegitimate ; one exists *de jure*, the other *de facto*. The one depends for its support upon the laws and existing institutions, the other upon its physical power to maintain itself.[1]

These distinctions, it will be seen, are based upon the most radical differences; for, in many respects, Constitutional and Revolutionary Conventions are the antitheses of each other. So essentially different are the two bodies and their functions, powers and purposes, that it is to be regretted that we have but one word—"Convention"—by which to designate them both; but that they should both have come to be recognized, in the minds of some public men, not only as Conventions, but as *Constitutional* Conventions, is both lamentable and dangerous—lamentable because it is fraught with danger, and dangerous because, should the error gain currency, and a Constitutional Convention, under the influence of political excitement and zeal for party advantage, attempt to exercise the powers of a Revolutionary Convention, under the delusion that it is legally invested with such powers, civil war might be the result, or in any event the liberties of the people would be endangered.

[1] Opinion of O'Neil. J., in State *ex rel.* McDaniel *v.* McMeekin, 2 Hill (S. C.) p. 222; compare Guizot's Civilization, Vol. I, Lect. III.

This confusion of thought, as to the supposed identity of the two bodies, arose out of the fact that the Constitutional Convention, as we now have it—a regular, legitimate institution, contemplated and provided for by the existing system of government—is of comparatively recent origin. The early so-called Constitutional Conventions were in fact Revolutionary Conventions, which received this designation simply because they framed Constitutions, although they were irregular, abnormal and illegitimate bodies, the existence of which was neither provided for nor contemplated by the preceding social system.[1] When the modern Constitutional Convention gradually came into being and finally established itself as one of the permanent and fundamental institutions of our social system, recognized and provided for by existing Constitutions, written or unwritten, the same name attached to it as to the first conventions which framed constitutions, but with a materially different import. Originally Constitutional Conventions meant merely those conventions which framed constitutions, but now the term is *properly* the designation only of those constitution-building conventions which exist and perform their functions according to law. This identity of name, however, is largely responsible for the failure of many persons to discriminate and distinguish between the two essentially different bodies which pass commonly under the same designation.

In the earlier days existing social systems did not contemplate the legal possibility of, and therefore made no provision for, any fundamental change in their constitutions; hence, the only means of effecting such change was, *by revolution,* to overthrow the existing government, and, by force, either to engraft upon it the desired changes, or else to substitute an entirely new system in its place. But, as the science of government became better understood, and the great doctrine of the *right* (not merely the *power*) of the people to change their government, was promulgated, it was found that it was not necessary to resort to revolution in order to change or modify government, but that such changes or modifications might be made as peacefully, as orderly and as legally as any ordinary function of government could be exercised. From the idea involved in this doctrine grew the *modern* Constitutional Convention, an institution so far unconnected and inconsistent with revolution, either peaceful or violent, that its whole purpose and *raison d'être* is *to prevent, and do away with, the necessity or excuse for revolution*—in fact, it might properly be called the "*Anti-Revolutionary* Convention."

[1] Kamper *v.* Hawkins, 1 Va. Cases, 20, 69–74.

This species of convention is essentially an American institution. It has no counterpart in England, because, since the year 1689, the lawful power of changing the constitution of that realm (as well as the ordinary powers of government) is vested in Parliament. *Revolutionary* conventions, however, are not peculiar to any country, but have existed wherever, and will continue occasionally to exist as long as, the ultimate and eternal right of revolution remains—a right which, it is said, depends solely upon the power to successfully invoke it.[1]

The convention, however, with which we have to deal, and which, to avoid confusion, may be designated as the Anti-Revolutionary, or American, convention, did not, Minerva-like, spring fully developed from the brain of our early statesmen; but, like all other great and lasting political institutions, it was the result of the gradual and healthy development of great truths and principles of government—fruit, the beauty and value of which was doubtless never fully comprehended by those who planted the seed. Thus it is, that the real nature and functions of the Constitutional convention, as we now have it, were probably never understood by the original founders of our Government—certainly not by some of them, who confused its functions and powers with those of Revolutionary conventions, which, up to that time, were the only known kind of constitution-making conventions.[2]

The first and crudest conventions were in no sense representative bodies; but were mere voluntary, irregular, illegitimate assemblies of individuals, acting on their own motion and on their own behalf, who felt themselves sufficiently powerful to resort to the ultimate right of Revolution, and wrest, by violence, from their sovereigns, such governmental concessions as they desired. The existence of such bodies was neither provided for, nor recognized, by the laws or existing social system. They relied merely on the right of *vis major* to justify their actions and support their demands. Such was the Convention of the Barons at Runnymede in 1215, that framed, and, in a sense, enacted, Magna Charta, the first faint suggestion in England of a written constitution.

The next development of the Convention idea manifested itself in assemblies equally as irregular, in that they were entirely unprovided for by existing laws and not contemplated by the existing political

[1] Koehler *v.* Hill, 60 Iowa, 543.

[2] Jameson's Const. Con. sec. 14.

systems; but yet they were vastly more regular and orderly in their origin and organization, and, in their proceedings, followed more closely the analogy of legal forms and precedents, than their predecessors. Such were the famous English conventions of 1660, which recalled Charles II, and of 1689, which transferred the crown to William and Mary.[1]

These two conventions were the prototypes of the first American conventions called to establish government for the embryo States—then but revolted colonies.

It will readily appear that all of these early American conventions, as well as their two great English prototypes, were, strictly speaking, *revolutionary* bodies, assembled, not to repair and improve the edifice of an existing government, but, in the absence of all government, to stand upon the ruins of the state, to brood over chaos, as it were, and to create, *ab initio*, a new social organization. "Back of them the chasm of social anarchy yawned," and, *ex necessitate rei*, they themselves acted as temporary and provisional governments in all departments, legislative, judicial and executive, until regular and permanent governments should be established.

When the Convention of 1660 was convened in England, a state of anarchy existed which threatened a military despotism;[2] when that of 1689 assembled, even "the justices of the peace had abandoned their functions";[3] and, when the first American conventions were held, the authority of England had been thrown off and no definite form of government established in its place.[4] Under such circumstances, those Conventions were doubtless justified in assuming and exercising the most absolute sovereignty, not only in providing a new Constitution and political system, but in exercising, themselves, dictatorial powers, until they were ready to launch their new governments. But how can a convention, elected and assembled according to law, with all the fnnctions of existing government in full operation, excuse the attempt to assume the unlimited powers of a Revolutionary convention? As well might the civil, assume the powers of a military, governor.

This entire heresy—the doctrine of the unlimited and absolute sov-

[1] 2 Macaulay's Hist. Eng. 613.

[2] 1 Macaulay's Hist. Eng. 142.

[3] 2 Macaulay's Hist. Eng. 549.

[4] Cooley's Const. Lim. p. 26; Jeff. Notes on Va. pp. 130 *et seq.*; Kamper v. Hawkins, 1 Va. Cases, 20, 57, 72.

ereignty of the Constitutional convention as an institution—is based, strange to say, upon a misconception, or perversion, of the very principle to which the Constitutional, as distinguished from the Revolutionary, convention, owes its origin, and from which the limitation of its powers results: namely, the principle that the People have the *right* to alter their government whenever they please.

No one ever doubted the *power* of the people to do this, if once they should unite for the purpose; but, for ages, both Church and State united in denying them the *right*. Thus it will be seen, in all the great landmarks of the English Constitution, such as Magna Charta, the Petition of Right, the Bill of Rights, etc., resort was had to the fiction that the great principles therein enunciated were no more than the ancient rights of the people which had always existed and were now being merely reiterated and vindicated—this, in order to avoid any appearance of innovation or change, it being regarded as a religious truth that the people had no right to *change* their government.

Both Church and State taught and enforced the dogma that governments were of divine origin, and existed by divine right; and to this proposition the corollary was obvious, that the people had no right to alter what God had established. Finally the idea took root and began to develop, that while government, in its general sense, as distinguished from anarchy, *may* be said to be a divine institution, yet no particular *form* of goverment could lay just claim to any divine right of preference over any other form. In this one idea lay the germ of all modern political and civil liberty. Yet, simple and elementary as it seems to us, in this age of enlightenment, it was many years before this idea could be reconciled to the tender consciences of many pious persons, who had been taught from their childhood, as a part of their religion, to hold in superstitious veneration this "*Icon Basilike*" and all that it stood for. These old prejudices and superstitions were hard to eradicate; and, in spite of the great English Revolution of 1688, there were many religiously timid souls in America in 1776, who found the same conscientious scruples to obstruct the accomplishment of their sincere desire for liberty that their Tory ancestors did in the Convention of 1689.

The doctrine of the divine origin of the government had been exploded for nearly a hundred years in England, but those worthy people continued to preach it to their discontented colonists in America, just as parents tell ghost stories to their children to keep them quiet.

It was to reassure these timid consciences, and to settle forever this

false dogma of the Middle Ages, that it was formally declared, in the first American Bill of Rights, adopted at Williamsburg on June 12, 1776, that the people have "an indubitable, inalienable and indefeasible *right* to reform, alter or abolish" their government; or, as stated a few days later in the great Declaration of Independence: "It is the *Right* of the People to alter or abolish it [the Government] and institute a new Government;" and the same great principle was substantially declared by all of the original American Conventions held to form governments for the newly revolted colonies. Then was forever buried, in America, the doctrine of Divine Right, the obsequies of which had been performed in England nearly a hundred years before, by the Convention of 1689.

Prior to 1689, in England, no change could be wrought by the people in their Government save by resorting to Revolution; it is true that they tried to give to their proceedings the form of legality, by the fiction that the innovations were not changes at all, but merely the re-assertion and affirmation of what had always existed; but, after all, their proceedings were invariably characterized by violence, irregularity, and more or less anarchy, degenerating frequently into civil war. Since the Convention of 1689, however, and the triumph of the Right of the People to alter their Government, all has been changed, and Revolution has been found to be as unnecessary, in England, to effect a change in government, as to enact an ordinary statute; as witness the great Reform Bills of 1832 and 1867, and other fundemental changes in the Constitution of England.

"The highest eulogy which can be pronounced on the Revolution of 1688, is this, that *it was our last Revolution*. . . . . In all honest and reflecting minds, there is a conviction, daily strengthened by experience, that *the means of effecting every improvement which the Constitution requires may* [now] *be found within the Constitution itself*." [1]

If this has been true of England since 1688, how much truer has it been of America since 1776! And yet some are still so infatuated as to contend, in this year of grace 1901, that an alteration of a constitution, in free and enlightened America, can be effected only by Revolution! Peaceful Revolution, they say, but none the less Revolution, with all its essentially concomitant ideas of political chaos, and irresponsible, limitless power in the governing body! "This extreme

[1] 2 Macaulay's Hist. Eng., p. 615.

medicine of the Constitution," says the immortal Burke, "ought not to be its daily bread."

The methods and instrumentalities employed by the English, and by the American people, for the exercise of their *right* to alter their government, are different; but the basic idea is the same, viz., that the exercise of this right involves nothing more than the normal, legitimate, orderly, and constitutional execution of one of the well-recognized functions and powers which reside in the people, organized as the sovereign body politic.

There is no occasion for resorting to a "state of nature," even in theory. In a state of nature there is no government, save the tyranny of force. The only ruling majority that nature recognizes is the majority, not of *numbers*, but of *power*. The laws of nature neither protect nor recognize civil or political rights. The people in a state of nature are a horde of ravening wolves, whose ideas of law and right are fully embraced by

> "The good old rule, the simple plan,
> That they should take who have the power,
> And they should keep who can."

Why then prate about being relegated to a "state of nature" whenever a change is to be made in our Constitution or form of government? One eloquent advocate of this theory was brave enough to follow the doctrine to its legitimate conclusion, when, in speaking of the unlimited power of a constitutional convention, even to deprive the people of their vested rights, he said:

"No restriction limits our proceedings. What are these *vested* rights? Sir, we are standing upon the foundations of society. The elements of government are scattered around us. All rights are buried: and from the shoots that spring from their grave we are to weave a bower that shall overshadow and protect our liberties." [1]

It is needless to say that these extravagant ideas never gained a footing in this country, although they have had, and still have, their advocates.[2]

[1] Remarks of Mr. Livingston in New York Convention of 1821. Deb. N. Y. Con. 1821, p. 105.

[2] For repetitions of similar claims, see remarks of Mr. Mitchell, Deb. Ky. Con. 1849, p. 863, and of B. F. Butler, Deb. Mass. Con. 1853, Vol. I, pp. 78, 79; also, Report of Com. on Powers in Illinois Convention, January 10, 1862; Wm. L. Yancy, Deb. Ala. Con. 1861. Mr. Peters, in Ill. Con. 1847, said: "We are what Louis XIV said he was, 'We are the State.' We can trample the Constitution under our feet as waste paper!" Ill. St. Reg., June 10, 1847. These are fearful doctrines—but see, also, debates on the proposed Constitutional Convention in Virginia Legislature, session 1899-1900, and extra session 1901, as reported in the contemporary press, in which prominent members announce similar doctrines.

This, and a number of similar expressions indulged in by our earlier statesmen (but never generally accepted by the American people), show how strongly tinctured their minds were with the doctrines of the French school, whose ideas of liberty were ever confused with principles of anarchy and disorder, and who, as shown by the proceedings of the National Convention of 1793, had so utterly failed to grasp and assimilate the true principles of the English Convention of 1689.[1] The French revolution, however, exercised a vast influence upon the contemporaneous thought of the world, and particularly of America—an influence which is still manifested from time to time in those claims, occasionally put forth by modern publicists, of vague, unregulated, unlimited powers in the people for the abolition of society and the creation of anarchy by the alleged "resumption of all the powers of government," and a "resort to a state of nature"—claims based upon the same principles that are asserted in support of the alleged *right* of the individual to commit suicide.

The entire theory is preposterous. Civilization (and particularly the order-loving, law-abiding, Anglo-Saxon civilization), it has been said, abhors anarchy, as nature does a vacuum. The "people" to whom our Bills of Rights refer, the only "people" whom civilization recognizes as having any sovereign or political rights, are the people, not in a state of nature, but as *organized* into social government.[2] When, therefore, we are discussing any problem or doctrine of government, or of political or civil rights, let us lay aside all consideration of the people in a "state of nature;"[3] let us omit all reference to that idle dream of the early theorists,[4] about the people meeting together in a "vast plain"—a thing they, of course, never did and never possibly could have done; and instead, let us ever consider the people, not as a capricious, erratic, lawless monster, but as an all-powerful, but orderly, force, moving only in lawful form, in accordance with the great rules and principles, and in pursuance of the methods, which are essential to its organized existence; or (to borrow a figure that another has used), not as a wild-eyed, screeching comet, rushing it knows not whither and laden with destruction for itself and all it meets, but as a steady, orderly, and life-giving planet, moving in the politi-

[1] Reflections on the Revolution in France—Edmund Burke.

[2] Burlamaqui, Pol. Law, chap. 5; Penhallow *v.* Doane's Adm'r, 3 Dallas, 54, 93; Brownson's American Republic, 135.

[3] Jameson's Const. Con., sec. 67.

[4] 1 Blackst. Com., p. 47.

cal firmament with irresistible power, but in accordance with the great laws of its being.

What, then, is this "right of the people" (or of a majority of them) to "alter their government," which the advocates of constitutional omnipotence invoke to support their views? Is it the right to resolve themselves into a "state of nature," to "scatter the elements of government around them," and to "stand upon the foundations of society"—"to conjure up chaos?" Surely not.

To the religious man, government, in its broadest sense, is still regarded as ordained by God, and therefore the people have no right to abolish it; to the non-religious, it is still an absolute essential for the existence of society. What *right*, then, have the people to abolish government? The "people," as we have seen—the only "people" whom political society can recognize—are the people organized into a government of some sort. If, then, they should abolish all government, they would manifestly destroy their own existence.

The doctrine of the right of the people to govern themselves is true only *sub modo*. Strictly speaking, it is obvious that the people cannot govern themselves—they must have a government to do this for them. The purest and most elementary democracies of Greece, embracing scarcely more than a single village, were obliged to employ the instrumentalities of a government. The very idea of governing, in a political sense, implies, *ex necessitate rei*, the existence of a government, as a distinct organization from the great body of the "people" themselves. We say, therefore that even were it possible for the people actually to assemble in the imaginary "vast plain" which the advocates of convention omnipotence claim they do in theory, it would still be impossible for them to abolish all government and govern themselves directly. The moment they abolish all government the "people," in a political sense, would cease to exist, human society would expire, and anarchy, rising like a pestilential vapor, would hang over a raging herd of savages.

When we speak of the right of the people to govern themselves we do not mean what the words literally imply, but merely their right to alter or amend their government, or to replace it with a new one, at their pleasure.

The existence of government is absolutely essential to the existence of the "people" in any political sense; and the only way in which the people have a *right* to abolish the government is by substituting a new one in its stead. There can be no hiatus between them.

The idea of the people resuming—taking back into their own hands —all the powers of government is a delusion. The people can never take the powers of government into their own hands; the utmost they can do is to enlarge or curtail, amend or alter, those powers in the hands of their government, or to transfer them from one government to another; but they can never "resume" them *in toto*, Not only have they no *right*, but they have no *power* to do so. They *can* abolish government, and thereby destroy their own political existence, but they can never directly exercise the powers of government—only a government of some sort can possibly do this.

Let not the people, therefore, listen to the specious arguments of the advocates of constitutional omnipotence, and deceive themselves by thinking that they, the People, have "resumed the powers of government." Such a thing is impossible; it is an absurdity. They have done, and can do, nothing of the kind; but, if the People permit to be made good the claim of a Constitutional Convention to unlimited power, they will have merely changed a free republican Government for a despotic oligarchy; for a Constitutional Convention which has absorbed all the powers of the State is, for the time being, the Government; it is the Convention, and not the "People," that will have "resumed all the powers of government," and thereby become the People's master instead of its servant.

Should the People fully understand this fallacy about "resuming the powers of government," and be brought to an appreciation of the undoubted fact that under that specious guise they will, in fact, be only surrendering their absolute sovereignty and transferring all the powers of government to a dictatorial oligarchy in the form of a Constitutional Convention, can it be for a moment imagined that they would ever agree to call such a convention into being, even to correct the worst evils in the Constitution?

But let us for a moment suppose that the majority of the people should, at any time, be prevailed upon ("Esau-like")[1] to sell their birthright, call such a Convention, and, *by express plebiscite*, invest it with the very powers which, it is claimed by the advocates of Constitutional Omnipotence, naturally inhere in, and necessarilly appertain to, all Constitutional conventions, abolishing the old Government and placing all power in the hands of the Convention: Can it be conceived that the old Government would recognize any such powers in the Convention, whether expressly conferred upon them by the People or not?

[1] Debates Va. Con. 1829, p. 866.

Would the government—even for a day—of such a convention, be a "Republican form of government," such as the Constitution of the United States guarantees to each State? Would not the old Government be legally bound to resist the usurpation of such a Convention, and would not the Government of the United States be bound to intervene and forcibly put down such a usurpation?[1]

The continuous existence of a Government,[2] of some sort, distinct from the general mass or body of the People, is just as essential to the existence of political society, as the existence of the "People" themselves.[3] It is unquestionably *possible* for the People to abolish and destroy all government, but by doing so they commit political suicide and *ipso facto* destroy themselves as a social body, resolving themselves thereby into a disorganized, amorphous mass of individual animals, having no more corporate existence than a herd of buffalo. It is *not even possible*, however, for them to "resume" and directly exercise the powers of government, without the intervention of a government itself. How would it be possible for all of the people, even if they should amount to only a few hundred, to personally and *en masse* enact, expound and execute the laws—the bare suggestion is a preposterous absurity.[4] Therefore we say, that while the People have the power, but not the right, to abolish all government and create anarchy, they have neither the power nor the right to "resume," and directly execute and administer all the powers of government: so long as there is a social organization of some sort in existence, there must be a Government, distinct from the "People." If, therefore, by the act of calling a Constitutional convention into being, all the powers of the *existing* Government are withdrawn, so that, as has been recently contended, the old Government continues to exist merely by sufferance, then it follows that those withdrawn powers are not "resumed" by

[1] Federalist, No. 43, p. 217.

Precedents for the putting down of illegal Conventions by the old Government (assisted in one instance by the Federal arm) may be found in the proceedings of the government of Maryland in 1837, and of Rhode Island in 1842. We do not refer anywhere in this article to any proceedings connected with the secession or reconstruction periods, which are too revolutionary and irregular to serve as precedents for constitutional doctrines.

[2] By which is meant a body of individuals by whom the functions of government are actually administered.

[3] Rousseau, "Social Compact," p. 73; 1 Blackstone's Com. (4th Cooley's ed.), p. 48; Bentham's "Fragment on Government," Works Vol. I, p. 263; Calhoun's "Disquisition on Government," Works Vol. I, p. 2; Judge Tucker in sec. 1, note B, of Appendix to Vol. 1, Tucker's Blackstone; Tucker (J. R.) on Const. sec. 3.

[4] Montesquieu "L'Esprit des Lois," Book 2, sec. 2, p. 10. Parker *v.* Com. 6 Barr (Pa.) 512.

the People, but are, *instanter*, vested in the Convention, which forthwith becomes the Government—there can be no hiatus, even in theory, unless there be anarchy also.

Thus, all Revolutionary Conventions (in which such absolute powers as are claimed for many Anti-Revolutionary Conventions are, in fact, vested), are *provisional Governments.*[1] Such governments are none the less despotic because there are "thirty tyrants" instead of one.

If the powers of our present Government are withdrawn, even in theory, then the Convention will be our government, and not the People; and, if the powers of that Convention are absolute, as is claimed, then is our Government an absolute oligarchy and a despotism.[2] The conclusion is inevitable.

In times of civil war, when domestic commotion and violence have created theoretical, and threatened actual, anarchy, the People may be justified in setting up such an oligarchy and placing themselves at its mercy, as a mere choice of evils, in the hope that their newly-created masters will not abuse the confidence of the people, and will, in due time, voluntarily restore to them a free republican government—just as, under similar circumstances, the Romans sometimes appointed a Dictator. But surely no people would be so fatuous as to resort to such a dangerous experiment in time of profound peace; and, if any State of the American Union should attempt to lay aside its republican form of government, and substitute in its stead that of an irresponsible, omnipotent Convention, combining in itself all the powers of Government, (Legislative, Judicial and Executive,) even for a single day, it would clearly be ground for the forcible intervention of the Federal authority, to put down and stamp out a government so foreign to all ideas of a free republic. "The concentrating these [Legislative, Judicial and Executive Powers] in the same hands is precisely the definition of despotic government. . . . An elective despotism was not the government we fought for."[3] Why, then, should we, on the theory that the Convention stands for the whole body of the *People* assembled in a "vast plain," assume for it *governmental* powers that, as we have shown, the People, themselves, could neither have nor exercise, even if they were in fact so assembled? And why attribute to such Convention the powers and functions of a government, when it is manifest that the people never would, and, under the Fed-

[1] Jameson's Const. Con., sec. 7.

[2] Jefferson's Notes on Va., p. 128.

[3] Id., p. 129.

eral Constitution, never could, set up such a government? If the Convention be regarded as the embodiment of the People, it cannot exercise all the powers of Government, because the People themselves cannot exercise those powers; if it be regarded as the Government, its existence is not permissible in the United States—no, not for a single day.

It has been pointed out that in all States the concurrent existence of the "People" and the "Government," as distinct and separate bodies, is necessary, and the existence of each of these bodies is essential to the existence of the other. The Government can absorb and exercise the powers of the People, but cannot destroy their existence. The People can destroy the Government (and themselves along with it), but cannot absorb and exercise its powers. Conventions may be said to stand as the representatives either of the People or of the Government. Those that stand for the Government exercise all the functions of the Government, and, like the Government, may absorb the powers of the People; such are the Revolutionary Conventions. Those, however, that stand for the People cannot exercise the functions of Government any more than the People can, but can only *amend* or *alter* the Government, or *replace* it with a new Government—functions which alone the People can perform, and which none but the People *can* perform. Such are the modern Constitutional, or Anti-Revolutionary, Conventions. Hence it follows that Revolutionary Conventions, standing for the Government, may, and (being despotic governments) generally do, assume and exercise the powers of a Constitutional Convention, which stands for the People—just as the Government may assume and exercise the powers of the People; but a Constitutional Convention (standing as it does in the place of the People) can never assume nor exercise the powers of a Revolutionary Convention (standing for the Government), any more than the People can assume and exercise the powers of the Government. As soon as a Constitutional Convention assumes the powers of Government, it ceases to be a Constitutional, and becomes a Revolutionary Convention[1]—it no longer represents the People, but the Government, which has usurped the powers of the People and added them to its own.

From these differences in the two kinds of conventions it is manifest that the old Government cannot co-exist with a Revolutionary Convention, which is itself the Government; but it is equally manifest that such old Government can, and must, co-exist with a Constitu-

[1] Jameson's Const. Con., p. 11.

tional Convention, which stands for and represents the "People," whose very existence requires the co-existence of a Government—and such co-existing Government continues in full force, in theory and in fact, until it is actually changed, amended, or replaced with a new Government, by the People, or its representative, the Constitutional Convention. It is the legal *adoption* of a new *Constitution*—not the calling or assembling of a Constitutional Convention—that alone, in fact or in theory, alters, or even interrupts, the existing Government, which, in all of its branches, legislative, judicial and executive, continues in full force and *de jure*, until such new Constitution has been actually and legally adopted.

The People, as has been pointed out, have the right neither to abolish all Government, nor to "resume" its powers, nor (in a State of the Union) to confer them upon a convention (which, not being a republican form of Government, is prohibited by the Federal Constitution); but they have lawful power only to *alter* or *amend* the existing Government or to *replace* it with a new one—preserving always (in the States of the Union) "a republican form of Government." And this is the full limit of the powers of the People of any State in the American Union, whether they be all assembled in a "vast plain" or scattered throughout the State in separate bodies.[1] If, then, these be all the powers of the People themselves, how can a Constitutional Convention, which stands for them, and as their representative, acquire any greater or additional powers?

It is apparent, then, that the Constitutional Convention has *no* power either to abolish the Government or to assume its functions, even though the People should expressly confer upon such Convention *all* of their powers.

But are the People, by the mere act of calling a Convention, obliged to confer upon it *all* of their powers? Surely not. Upon what principle, for what reason, or by what analogy, can it be contended that the people cannot constitute a limited, as well as a general, agency—

[1] Doubtless the People (save when—as in America—the existing Constitution has delegated all powers of ordinary legislation to the Legislature—Jameson's Const. Con., secs. 403 and 424; Rice *v.* Foster, 4 Harr. (Del.) Rep., p. 479; Parker *v.* Com'lth, 6 Barr, 515) have the ultimate power and function of all *legislation*, fundamental and administrative—Pomeroy, Const. Law, sec 88. But this is only one of the three functions of Government—the remaining two, it is obvious, the people, *en masse*, cannot execute. Montesquieu "L'Esprit des Lois," book 2, sec. 2, p. 10. I am aware that Pomeroy (Const. Law, sec. 89) and Story (Const., sec. 207) *seem* to take a different view, and that Lincoln, in his famous Gettysburg speech, on November 19, 1863, *seems* to adopt their view, but it is submitted that reason, as well as the great weight of authority (see notes 3 and 4, p. 90, *ante*), supports the view taken in this article.

that they cannot employ an agent or appoint a representative to do a particular service for them, without surrendering to such agent or representative *all* of their powers and functions? To refuse to the People this right would be to deny them the powers conceded to every individual or private corporation—a position hard to be maintained with any show of consistency by those who, at the same time, claim for the People a transcendent, limitless omnipotence, even beyond their real powers.

Let us revert for a moment to Rousseau's theory—the imaginary assembling of all the people in a vast plain—to which the advocates of convention omnipotence are so fond of referring. What would doubtless be the order of proceeding in such an assembly, assuming that there *was* any order, and not mere anarchy, prevailing?

It has often been remarked, that the construction and organization of the Body Politic is very analogous to that of ordinary business corporations, of which commonplace bodies many of our original States are developments. Let us for a moment pursue this analogy, and treat the supposed assembly of all the people in a "vast plain" as if it were an immense meeting of all the stockholders in some corporation. Substitute the "people" so assembled for the stockholders—the Government, for the Board of Directors—the Constitutional Convention, for a special, select Committee, appointed by vote of the stockholders, either to adopt, or to draft and report, by-laws—and the analogy is obvious.

Every corporation (which is a joint stock company) must have a Board of Directors to operate it, as well as Stockholders to compose and control it; and so the State must have a Government to operate it, as well as the People to compose and control it. While the Stockholders *en masse* can never be the Directors, yet they absolutely control the Directory, which derives all of its powers from them; and so, while the People can never actually be the Government, yet they, in like manner, absolutely control the Government, which derives all of its powers from them. Hence it follows that, just as a Directory in a corporation cannot enlarge or curtail the powers of a Committee appointed by the Stockholders for the purpose of adopting or reporting by-laws, so is the Legislature (or the existing Government, of which it is a part) powerless to enlarge or curtail the powers of a Convention, which derives its authority direct from the People. The existence of the supposed Committee on By-laws would in no manner conflict with the existence of the Directory of the corporation,

nor would such Committee have any shadow of authority for usurping the powers of the Directory and undertaking to operate and manage the business of the company; and so the existence of a Constitutional Convention in no wise interferes with the continued existence of the Government, and such Convention has no excuse for assuming any of the powers of the Government.

In the one case, both the committee and the directory derive their powers from the same source—the stockholders—and the functions of neither conflict with those of the other, each being of equal authority in its own proper sphere; in the other case the Government and the Constitutional Convention each derives its authority from the same source—the People; each is vested with essentially distinct and independent functions, in no wise conflicting with each other, and the Constitutional Convention has no more right to assume the powers of the Government than the Government has to assume the powers of the Constitutional Convention.

In the case supposed the old by-laws would continue in force until the new by-laws should be actually adopted—the mere appointment of a committee on by-laws not suspending or impairing, to the smallest extent, the continued existence and validity of the old by-laws; and thus, by analogy, it will be seen that the old Constitution and laws of the State remain in full force and virtue until the new Constitution is actually and legally adopted—the mere existence of a Constitutional Convention not impairing their vigor in the slightest degree.

In the case of a corporation, the stockholders surely are under no *obligation* to authorize their Committee on By-laws to actually adopt the new by-laws without referring them back to the stockholders for their final action, although it is equally clear that the stockholders have the *right* to confer such power upon their committee, should they so desire. And, for similar reasons, it is equally manifest that the People are under no sort of *obligation* to confer upon a Convention power to adopt the new Constitution without referring it back to the People, although they have an equally clear *right* to confer such power upon the convention, should they so desire. Observe, however, that it is the stockholders and not the directors—the People and not the Legislature (or Government)—who alone can confer any such power. The Convention, in the one instance, would have no more authority to exceed the limit of its power, as prescribed by the People who called it into being, than would the committee, in the other instance, have the right to exceed the powers conferred upon them by the stockholders who elected them

and created their committee; and, should either of these bodies undertake to exceed their just powers, then the illegal promulgation of pretended new by-laws by the one, or of a pretended new Constitution by the other, would be equally disregarded and treated as a nullity, by the directors, or the existing government, as the case might be.[1]

Thus it will be the more clearly seen that a Constitutional Convention is no more the People than, in the supposed case, may a Committee on By-laws be said to be the Stockholders. The Convention is but a select *committee of the people*,[2] created and elected for certain purposes, and having such authority only as the People, who created it, choose to confer, and do confer, upon it, which authority, of course, can never exceed the full powers of the People themselves, and may, and nearly always does, fall far short of them. In ascertaining the extent of such authority, surely every rule of law, wisdom, prudence and safety requires that the powers claimed by such Committee, or Convention, should be affirmatively established, and that, in cases of doubt, all presumptions should be indulged *against* the existence of the power so claimed.

From the foregoing considerations, the following conclusions result:

1. That a Constitutional Convention is a normal and legal institution, and not a foreign and disturbing element in the State—it involves, neither revolution nor a dissolution of the ordinary government, even in theory.

2. That the regular Government continues in full force, *de jure* as well as *de facto*, uninterrupted and unaffected, even in theory, by the existing Constitutional Convention, until a new Constitution is actually and legally adopted.

3. That a Constitutional Convention is not the People, with sovereign and unlimited powers, but a mere Committee of the People, with only such limited powers as the People may expressly bestow upon them, the granting of which powers will be strictly construed against the Convention.

4. That under no circumstances can a Constitutional Convention exercise the powers of a *Government*, or perform any other function than to adopt or propose (according as the People may authorize them)

[1] Wells *v.* Bain, 75 Pa. St. Rep. 39; Luther *v.* Borden, 7 How. (U. S.) 1; Note to Miller *v.* Johnston, 15 L. R. A. 524; State *v.* Tuffly, 19 Nev. 391; Koehler *v.* Hill, 60 Iowa, 543.

[2] Jameson's Const. Con., sec. 453.

changes in the fundamental law of the State—laws for the construction, not the operation of government — the functions of the millwright, not of the miller.[1]

5. That the Legislature has no authority to enlarge or curtail the powers of the Constitutional Convention, which derives its authority directly from the People.

6. That should such Convention attempt, in excess of the powers expressly given it by the People, to *enact* changes in the fundamental law, such pretended changes may, and should, be disregarded and treated as nullities by the old Government, which would have the right, in such case, to punish the members of such usurping Convention for their treasonable attempt.

7. That such irregularly enacted changes may, however, be ratified by the subsequent acquiescence of the People, as well as by their formal vote; and any act of the existing Government in recognition of such irregular constitutional changes should be regarded as such acquiescence and ratification by the People, whose only legal remedy would then be the convening of a new Convention.[2]

[1] Jameson's Const. Con.

[2] This discussion has been based upon principle rather than authority; but, should authorities be desired to support the foregoing conclusions, it is believed that the following will be found to substantially sustain them *in toto:*

Debates Va. Con. 1829, pp. 864 and *seq.;* Elliott's Debates Fed. Con. 1787, Vol. I. p. 416, and Vol. V, pp. 196 and 216; Jameson on Const. Con., Chaps. VI and VII; Bryce Am. Com., Vol. I, pp. 433 and 667 and *seq.;* Cooley Const. Lim. p. 32; Pomeroy's Const. Law, secs. 80 and 82; Wells *v.* Bain, 75 Pa. St. Rep. 39 (1873); Wood's Appeal, 75 Pa. St. Rep. 71; Speech Jeremiah T. Black, Debates Pa. Con. 1872, Vol. I, pp. 57 and 58; Opinion of Justices Sup. Ct. (Chief Justice Shaw), 6 Cush. (Mass.) 572; Opinion of Sup. Ct. of Rhode Island, 14 R. I. Rep. 649; State *ex rel.* McDaniel *v.* McMeekin (especially dissenting opinion of Harper, J.) 2 Hill (S. C.) 273; Gibbes *v.* G. & C. R. R. Co., 13 So. Car. 242; Bradford *v.* Shine, 13 Fla. 393; Quinlan *v.* Houston & T. R. R. Co., 89 Tex. 376-7; Opinion of Bennett, J., in Miller *v.* Johnston, 92 Ky. 589; State *v.* Tuffly, 19 Nev. 391, Koehler *v.* Hill, 60 Iowa, 543; Oberholtzer's "Referendum in America," Chap. IV; Borgeaud "Adoption and Amendment of Constitutions" (Hazen's translation), pp. 145, 191-3-4, and 287-8 and 336 and *seq.;* Black's Const. Law (2d ed.), p. 49.

The only authorities *apparently per contra* that have come under my observation are as follows: 1 Tucker on Const., sec. 56—a mere naked statement in a few words without discussion or authorities; Missouri *v.* Neal, 42 Mo. 119—the plainest case of *obiter dictum*—the court (not deciding, but merely speaking *arguendo*) saying in two or three words that *that* convention (which was not expressly required to submit its work to the people) might have enacted the Constitution without referring it to the people. This, if a decision at all, was rather a construction of the express powers given that particular convention (Laws of Mo. 1863-4, p. 25), than of the powers of Constitutional Conventions in general. It plainly was not a decision at all, but a mere *dictum.* See Cooley's Const. Lim., p. 32. Kamper *v.* Hawkins, 1 Va. Cases, 20 and *seq.*, was decided distinctly on the ground that the Convention of 1776 was not a constitutional but a revolutionary body, and that its work had been ratified by the subsequent acquiescence of the People. Loomis *v.* Jackson, 6 W. Va. 708, was based on the ground that a court organized and existing under a Constitution cannot ques-

Viewed in this light, the Constitutional Convention, instead of being a menace to liberty, a dangerous experiment with a body of vast, vague, unknown and unlimited powers, will be seen to be just as regular, legitimate and normal a body as the Legislature; that its powers and functions are just as well defined and as strictly limited; that the alteration or reconstruction of a Constitution need, and should, involve no more resort to revolution, or a "state of nature" (even in theory), and be fraught with no more danger to the Commonwealth, than the enactment of an ordinary statute; and that the change from the old to a new Constitution should involve no more irregularity or breach in the smooth and peaceful continuity of Government, than the change of executives.

It is a maxim, equally applicable to Constitutions and ordinary statutes,[1] that the laws recognize no right without a corresponding legal remedy; and it would be monstrous to assert that our system of government contemplates and provides no remedy, save that of revolution (although peaceful), whereby to assert that *right* of the people to change their government, so proudly and persistently declared by every Bill of Rights ever adopted in America. If the people have the *right* to change their Government, they surely can exercise this right in a *legal* manner; and no one has ever yet contended that revolution is legal, however peaceful and however justifiable.

It may be said that this "peaceful Revolution" theory is a harm-

tion its validity—Judge Woods merely remarking (without discussion) that the powers of the convention are "*in the nature of* sovereign powers"—exactly what he meant by this does not appear; nor was the decision based on the ground of the sovereignty of conventions—another plain case of *obiter dictum*. Miller *v.* Johnston, 92 Ky. 589, held that the old and existing Constitution expressly authorized the convention to enact the new Constitution without submitting it to the people; that the people, by acquiescence, had ratified the new Constitution, even if the convention had unlawfully enacted it; and that the court, having been organized under the new Constitution, could not question its validity. The court did not decide upon the powers of conventions generally, holding it unnecessary for the decision of the case; but Bennett, J., delivered a separate opinion, expressly holding that conventions are *not* sovereign. Sproul *v.* Fredericks, 69 Miss. 898, holds that conventions are not *necessarily* obliged to submit their work to the votes of the people; that the Mississippi Convention of 1890 was *expressly* authorized by the people to enact the new Constitution; but what the court would have held had the people *expressly required* the Constitution to be submitted to them, does not appear.

Of the 157 Constitutions adopted by conventions in the United States, 113 of them have been submitted to the people for ratification—Jameson's Const. Con., p. 497. Only three of these conventions have ever undertaken to exceed the express limitations put upon their authority by the people. Id. p. 305; "The declared sense of the American people throughout the United States on this very point cannot but be received with great respect and reverence"—Chancellor Kent's opinion on proposed act calling a convention in 1820—Id. p. 671.

[1] Federalist, No. 21.

less one, although unsound; that it 'serves merely as a lay figure on which to exhibit to advantage, in all their relations, truths that are connected but obscure.' "But the danger is, that that which is *supposed* will insensibly lose its hypothetical character, and come to rank as a truth, and so be made the basis of reasoning to other truths as unsubstantial as itself, but ignorantly, on account of the irregularity of their deduction, accepted as undoubted."[1] Let us be careful, therefore, that we do not inadvertently say or do anything to give color to this false and dangerous theory of Convention Omnipotence; for, as Jefferson well said: "One precedent in favor of power is stronger than a hundred against it."[2]

"As we cannot, without risk of evils from which the imagination recoils, employ physical force as a check on the government, it is evidence of wisdom to keep all the constitutional checks on the government in the highest state of efficiency, to watch with jealousy the first beginning of encroachment, and not to suffer irregularities, even when harmless in themselves, to pass unchallenged, lest they acquire the force of precedent."[3]

It is not intended to suggest that we are in danger of losing our liberties at the hands of the Constitutional Convention about to assemble in this State; but, if we allow to go unchallenged, or, by our acts, seem to acquiesce in, the claims of the advocates of Convention Sovereignty and Omnipotence—that a free People cannot amend or replace their Constitution without first surrendering all of their liberties to an irresponsible Convention, clothed with unlimited and sovereign powers, which it may retain indefinitely and exercise at pleasure—such a monstrous heresy will, sooner or later, inevitably rise up to confound and overwhelm us.

Staunton, Va. A. CAPERTON BRAXTON.

[1] Jameson's Const. Con., p. 21.

[2] Jefferson's Notes on Virginia, p. 135.

[3] Macaulay's History of England, Vol. I, p. 34.